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In The

Supreme Court of the United States

October Term, 1997

SHARLET BELTON COLLINS,

Petitioner,

vs.

CITY OF HAZLEHURST, MISSISSIPPI,

Respondent.

On Petition For Writ Of Certiorari To The Supreme Court Of The State Of Mississippi

PETITION FOR WRIT OF CERTIORARI

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Date: April 2, 1998

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QUESTION PRESENTED FOR REVIEW

Whether the unforeseeable application of a state statute by the Mississippi Supreme Court which criminalized, ex post facto, previously lawful conduct deprived petitioner of due process of law?

LIST OF ALL PARTIES TO THE PROCEEDINGS BELOW

The parties to the proceedings in the court whose judgment is sought to be reviewed are:

1. Sharlet Belton Collins, defendant-appellant below.
2. The City of Hazlehurst, Mississippi, plaintiff-appellee below.

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CITATION OF THE OFFICIAL AND UNOFFICIAL REPORTS OF THE OPINIONS

Petitioner seeks review, by writ of certiorari, of a decision rendered by the Mississippi State Supreme Court on February 12, 1998 denying petitioner's motion for rehearing, and petitioner seeks review, by writ of certiorari, of a decision rendered by the Mississippi State Supreme Court on December 22, 1997 affirming petitioner's conviction and sentence entered by the Circuit Court of Copiah County, Mississippi on February 23, 1995. The decision of the Mississippi State Supreme Court has not yet been reported. Therefore, it is set out in full in the appendix at App. 1-17.

CONCISE STATEMENT OF THE BASIS FOR JURISDICTION

Petitioner invokes the jurisdiction of this Court pursuant to 28 U.S.C. § 1257 and Sup. Ct. R. 10(c), 12, and 13 to review a decision of the Mississippi State Supreme Court that was entered on December 22, 1997, and an Order denying petitioner's motion for rehearing that was entered on February 12, 1998. This Court has jurisdiction of this case because the Mississippi Supreme Court has decided an important federal question in a way that conflicts with relevant decisions of this Court. The constitutional question presented herein was presented to but rejected by the Mississippi Supreme Court. Therefore, jurisdiction is conferred on this Court. *Murdock v. Memphis*, 87 U.S. 590 (1875).

CONSTITUTIONAL, STATUTORY, AND ORDINANCE PROVISIONS INVOLVED

This case involves the Fourteenth Amendment to the United States Constitution, § 67-3-53(e), Miss. Code Ann. (1972), § 67-3-65 Miss. Code Ann. (1972), and City of Hazlehurst, Mississippi Ordinance No. 180, § 2, sub-section e.

Fourteenth Amendment to the United States Constitution

Section 1. Citizens of the United States.

All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law, nor deny to any person within its jurisdiction the equal protection of the laws.

§ 67-3-53(e), Miss. Code Ann. (1972)[1]

In addition to any act declared to be unlawful by this chapter, or by Sections 27-71-301 through 27-71-347, and Sections 67-3-17, 67-3-27, 67-3-29, and 67-3-57, it shall be unlawful for the holder of a permit authorizing the sale of beer or light wine at retail:

(e) To permit persons of ill repute, known criminals, prostitutes or minors to frequent his licensed

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[1] This statute was amended in 1995 by Laws, 1995, ch. 398, § 1, which became effective on March 15, 1995. However, the section of the statute involved in this case was not amended.

premises, except minors accompanied by parents or guardians, or under proper supervision.

§ 67-3-65, Miss. Code Ann. (1972)

Municipalities may enforce such proper rules and regulations for fixing zones and territories, prescribing hours of opening and of closing, and for such other measures as will promote public health, morals, and safety, as they may by ordinance provide. The board of supervisors of any county may make such rules and regulations as to territory outside of municipalities as are herein provided for municipalities. Nothing in this chapter shall prohibit the governing body of any municipality from designating what territory surrounding churches and schools in said municipalities, and the board of supervisors of any county from designating what territory surrounding churches and schools outside of any municipality, in which light wines and beer shall not be sold or consumed.

HAZLEHURST ORDINANCE NO. 180, SECTION 2, SUB-SECTION E

It shall be unlawful for any holder of an on-premises permit to sell beer to permit anyone under the age of 21 years in his or her premises.

Any person found guilty of violating this Ordinance, shall to be sentenced up to a maximum of six (6) months in jail and a One Hundred Dollar ($250.00) fine.

STATEMENT OF THE CASE

Sharlet Collins owns a restaurant and lounge in the City of Hazlehurst, Mississippi named Club O'Hara. [App. 3, 34]. She holds an on-premises beer permit which allows her to sell beer to persons over the age of 21. [App. 3]. "Under § 67-3-53(e), Collins was allowed to permit minors to enter her Club only if they were 'accompanied by parents or guardians, or under proper supervision.' " [App. 6]. She allowed minors in the Club for special events when they were accompanied by parents, guardians, "or other supervising adults." [App. 22].

A special event occurred at the Club on October 22, 1994. The Band "Bones" was playing there. [App. 3, 22]. "Lakeith Brown, who was eighteen years of age at the time, entered the Club at approximately 8:30 p.m. with his cousin, Antonio Jordan, who was over twenty-one." [App. 3-4]. Antonio was supervising Lakeith that night. [App. 32].

Charles Smith, a police officer for the City of Hazlehurst, entered the Club that night and discovered "Lakeith was eighteen years of age." [App. 4]. He charged Collins with violating a municipal ordinance which made "it a misdemeanor to allow anyone under the age of 21 years in a business that has an on-premises retail beer permit regardless of whether the minor is accompanied by a parent or guardian or under other proper supervision." [App. 4-5]. She was convicted in the Municipal Court of the City of Hazlehurst for violating the ordinance on December 12, 1994. [App. 2, 5]. She appealed her conviction and sentence to the Circuit Court of Copiah County, Mississippi. Collins was found guilty, on

a trial de novo, in the Circuit Court in February, 1995 and sentenced "to serve thirty days in the county jail, suspended on two years good behavior [, placed on probation, and ordered] to pay a fine in the sum of $250.00 and court costs in the amount of $81.00." [App. 2]. Throughout the trial and appellate process, Collins asserted that "the ordinance was invalid because it made conduct that [was] permissible under state law a misdemeanor." [App. 2].

Collins appealed her conviction and sentence to the Mississippi Supreme Court asserting that her conviction was void because the city's ordinance conflicted with a state statute and her conviction was against the overwhelming weight and sufficiency of the evidence. [App. 1-17]. A divided Mississippi Supreme Court upheld her conviction and sentence on December 22, 1997. [App. 1-17].

On December 29, 1997, Collins timely filed her Petition for Rehearing before the Mississippi Supreme Court. [App. 20-31]. She asserted, *inter alia*, that her conviction and sentence and the Mississippi Supreme Court's affirmance violated "the Due Process Clause of the Fourteenth Amendment to the United States Constitution and is an ex post facto law." [App. 28]. She argued that prior to the Mississippi Supreme Court's affirmance of her conviction and sentence, she "was not given notice that **Miss. Code Ann. § 67-3-65**, [granted] municipalities the authority to enact ordinances that abrogated rights under a state statute." [App. 28]. She also argued that the statute relied on to affirm her conviction was unconstitutionally vague. [App. 29]. And, she argued that the Mississippi Supreme Court had unforeseeably enlarged a criminal statute and applied it retroactively. [App. 29-30]. The

Mississippi Supreme Court denied Collins' Petition for Rehearing on February 12, 1998.

ARGUMENT AMPLIFYING THE REASONS FOR ALLOWANCE OF THE WRIT

Petitioner's prosecution and conviction under the City of Hazlehurst, Mississippi's municipal ordinance and the Mississippi Supreme Court's decision affirming that conviction violates the Due Process Clause of the Fourteenth Amendment to the United States Constitution and is an ex post facto law. The Mississippi Supreme Court's decision criminalizes conduct that, prior to the decision, was not criminal. For the first time, the Mississippi High Court, has interpreted **Miss. Code Ann. § 67-3-65**, as granting municipalities the authority to enact ordinances in direct conflict with a state statute regarding the lawfulness of persons under 21 entering a place where beer is served. Prior to the instant case, **Miss. Code Ann. § 67-3-53(e)**, allowed a person under 21 to enter a place where beer was served if he or she was accompanied by a parent, guardian, or other adult. And, prior to the instant case, a municipal ordinance which conflicted with a state statute was void and unenforceable. *City of Amory v. Yielding*, 203 Miss. 265, 34 So. 2d 726 (1948). Prior to the instant case, Mrs. Collins was not given notice that **Miss. Code Ann. § 67-3-65** granted municipalities the authority to enact an ordinance that abrogated rights granted under **Miss. Code Ann. § 67-3-53(e)**. This Court, in *Bouie v. Columbia*, 378 U.S. 347, 351 (1964), "struck down a state criminal statute under the Due Process Clause where it was not 'sufficiently

explicit to inform those who are subject to it what conduct on their part will render them liable to its penalties.' " Where a person "of common intelligence" has "to speculate as to the meaning of [a] penal [statute], the statute is unconstitutionally vague." *Id.* As a penal statute, **Miss. Code Ann. § 67-3-65** is unconstitutionally vague. It does not give notice to people of ordinary intelligence that it grants municipalities the authority to criminalize conduct deemed lawful under **Miss. Code Ann. § 67-3-53(e)**. This Court further held in *Bouie*, supra, 378 U.S. at 352, that "judicial enlargement of a criminal Act by interpretation is at war with a fundamental concept of the common law that crimes must be defined with appropriate definiteness." Only the Mississippi Legislature has the authority to define crimes. *Winters v. State*, 473 So. 2d 452, 456 (Miss. 1985). The Mississippi Supreme Court's interpretation that **Miss. Code Ann. § 67-3-65** grants municipalities the authority to define crimes is inconsistent with **Miss. Code Ann. § 67-3-53(e)** and the holding in *Winters v. State*, supra. This inconsistent holding is an enlargement of both statutes, **Miss. Code Ann. §§ 67-3-53(e) & 65,** and violative of the Fourteenth Amendment to the United States Constitution. This enlargement was unforeseeable by Mrs. Collins. "Indeed, an unforeseeable judicial enlargement of a criminal statute, applied retroactively, operates precisely like an ex post facto law, such as **Art. 1 § 10**, of the Constitution forbids." *Bouie*, supra, at 353. (emphasis added). See, also, *Douglas v. Buder*, 412 U.S. 430, 432 (1973) ("the unforeseeable application of that interpretation in the case before us deprived petitioner of due process"); and *Palmer v. Euclid*, 402 U.S. 544, 546 (1971) ("no man shall be

held criminally responsible for conduct which he could not reasonably understand to be proscribed").

The Due Process Clause of the Fourteenth Amendment prohibits a State Supreme Court "from achieving the same result [as an ex post facto legislative enactment] by judicial construction." *Bouie*, supra, at 353-54. The Mississippi Supreme Court's affirmance conflicts with this Court's due process holding in *Bouie*, supra, *Douglas*, supra, and *Palmer*, supra.

CONCLUSION

Since the Mississippi Supreme Court has decided an important federal question in a way that conflicts with relevant decisions of this Court, petitioner's Petition for Writ of Certiorari to the Mississippi Supreme Court should be granted.

This the 2nd day of April, 1998.

CARROLL RHODES
Counsel of Record
for Petitioner

IN THE SUPREME COURT OF MISSISSIPPI

NO. [illegible] KA-00271-SCT

SHARLET BELTON COLLINS

v.

CITY OF HAZLEHURST, MISSISSIPPI

DATE OF JUDGMENT: 02/23/95

TRIAL JUDGE: HON. LAMAR PICKARD

COURT FROM WHICH APPEALED: COPIAH COUNTY CIRCUIT COURT

ATTORNEY FOR APPELLANT: CARROLL RHODES

ATTORNEYS FOR APPELLEE: EDWARD E. PATTEN, JR.

DISTRICT ATTORNEY: ALEXANDER C. MARTIN

NATURE OF THE CASE: CRIMINAL – MISDEMEANOR

DISPOSITION: AFFIRMED – 12/22/97

MOTION FOR REHEARING FILED:

MANDATE ISSUED:

BEFORE DAN LEE, C.J., PITTMAN AND ROBERTS, JJ.

ROBERTS, JUSTICE, FOR THE COURT:

STATEMENT OF THE CASE

¶1. This criminal appeal is brought before this Court from the Circuit Court of Copiah County, Mississippi, by Sharlet Belton Collins (Collins), who was convicted of violating a municipal ordinance of the City of Hazlehurst, Mississippi (City). This ordinance prohibited on-premises

beer permit holders from allowing persons under the age of twenty-one (21) years to enter their establishments where beer is consumed.

¶2. The case was commenced on October 22, 1994, when Charles Smith, a police officer for the City filed a criminal affidavit against Collins. This affidavit charged Collins with violating the municipal ordinance. A trial was held in Municipal Court of Hazlehurst, Mississippi. By Order dated December 12, 1994, Collins was found guilty of violating the ordinance. On January 17, 1995, Collins filed her appeal of the decision to the Circuit Court of Copiah County.

¶3. On February 16, 1995, Collins filed her Motion to Dismiss, asserting the ordinance was invalid because it made conduct that is permissible under state law a misdemeanor. The Motion was overruled. On February 17, 1995, a jury trial was had in the Circuit Court of Copiah County, where Collins was found guilty of violating the ordinance.

¶4. At the conclusion of the City's case-in-chief, Collins moved for a directed verdict. The court overruled the motion. Collins requested a peremptory instruction after all of the testimony, but was refused by the court below. The jury returned a verdict of guilty. On February 23, 1995, the court sentenced Collins to serve thirty days in the county jail, suspended on two years good behavior probation, to pay a fine in the sum of $250 and court costs in the amount of $81. Collins filed a Motion for a New Trial or Judgment of Acquittal on February 27, 1995. The Motion was denied by the trial court on March 3, 1995.

¶5. Aggrieved by the decision of the lower court, Collins filed her appeal to this Court on March 10, 1995. She raises the following issues on appeal:

I. WHETHER THE CITY'S ORDINANCE CONFLICTS WITH A STATE STATUTE, THEREBY MAKING THE ORDINANCE VOID.

II. WHETHER THE CONVICTION OF COLLINS WAS AGAINST THE OVERWHELMING WEIGHT AND SUFFICIENCY OF THE EVIDENCE.

STATEMENT OF THE FACTS

¶6. Collins is the holder of an on-premises retail beer permit that allows the sale of beer by the can to people twenty-one years of age or older. She owns a restaurant and lounge in the City named Club O'Hara. It is worth mentioning that before patrons may enter the Club they are checked with a scanner for weapons. The City has an ordinance that prohibits individuals under twenty-one years of age from being inside a premises licensed to sell beer, where beer is allowed to be consumed. Collins testified that she was the holder of the permit, responsible for making sure the Club was run properly, responsible for hiring the people that check I.D.'s and provide security, and for telling her employees to check a person's I.D. if there was any question about the person.

¶7. On October 22, 1994, a band named "Bones" was playing at the Club. Lakeith Brown, who was eighteen years of age at the time, entered the Club at approximately 8:30 p.m. with his cousin, Antonio Jordan, who

was over twenty-one. There was a security guard checking for weapons with a scanner. He was supposed to check for the safety of customers and identification. The security guard used the scanner to check Lakeith for weapons, but did not check his I.D. Lakeith paid $10 for entry into the Club and was not questioned concerning his age.

¶8. The security guards were instructed to check patrons' identification, unless they knew the person entering the Club was over twenty-one. The Club had over one hundred patrons on this particular night. Collins testified that there were signs on the walls of the lobby to inform patrons they must be twenty-one years of age to enter the Club, and they must show identification upon entering. Lakeith stated that he was not paying attention to any signs when he entered the Club.

¶9. Lakeith entered the Club and proceeded to the dance floor. He stayed on the dance floor for about thirty minutes, and then went to the only bathroom in the building. Although Lakeith stated that the only place he saw people consuming beer was the bar, he had to pass through the bar area of the Club to get to the bathroom. As he left the bathroom, Lakeith was pulled to the side by Charles Smith, a police officer for the City of Hazlehurst, and asked to produce his I.D. It was at this time that Officer Smith learned Lakeith was eighteen years of age.

¶10. Officer Smith then charged Collins with violating the ordinance which makes it a misdemeanor to allow anyone under the age of 21 years in a business that has an on-premises retail beer permit regardless of whether the minor is accompanied by a parent or guardian or under

other proper supervision. She was found guilty by the lower court, and this appeal followed.

DISCUSSION OF THE ISSUES

I. WHETHER THE CITY'S ORDINANCE CONFLICTS WITH A STATE STATUTE, THEREBY MAKING THE ORDINANCE VOID.

¶11. The main point of Collins' argument on appeal is that the municipal ordinance under which she was convicted is void because it, in effect, nullifies Miss. Code Ann. § 67-3-53(e), by making conduct lawful under the statute illegal under the ordinance. At the end of Prohibition, the Twenty-First Amendment was ratified repealing the Eighteenth Amendment, which had outlawed intoxicating liquors in the United States. The Twenty-First Amendment basically restored rights to states to regulate the manufacture, sale, and consumption of alcoholic beverages. ***State Board of Equalization v. Young's Market Co.***, 299 U.S. 59 (1936), *reh. denied*, 299 U.S. 623.

¶12. The Mississippi Legislature enacted laws legalizing the manufacture, sale, and consumption within this state of light wines and beer of an alcoholic content of not more than four percentum by weight, specifically called the **Sale of Light Wine, Beer, and Other Alcoholic Beverages Act.** Miss. Code Ann. § 67-3-1, *et. seq.* The Act permitted but regulated the sale of beer in Mississippi. ***Hayes v. State,*** 69 So. 2d 845 (Miss. 1954). The citizens of Hazlehurst had previously voted, pursuant to Miss. Code Ann. § 67-3-9, for the City to allow on-premises sale and consumption of beer.

¶13. The legislature noted certain interests of local governments in regulating the sale of alcoholic beverages of this nature and granted specific powers to them, including municipalities. Miss. Code Ann. § 67-3-65 provides, "[m]unicipalities may enforce such proper rules and regulations for fixing zones and territories, prescribing hours of opening and of closing, and for ***such other measures as will promote public health, morals, and safety, as they may by ordinance provide***. . . . " (emphasis added). The City, using the previously mentioned statute above as a guide, adopted an ordinance making it unlawful to allow any person under the age of twenty-one years of age inside a premises licensed to sell beer, where beer is permitted to be consumed.

¶14. Collins obtained an on-premises retail beer permit allowing her to sell cans and bottles of beer to customers at her Club. Under Miss. Code Ann. § 67-3-53(e),[1] Collins was allowed to permit minors to enter her Club only if they were "accompanied by parents or guardians, or under proper supervision." The City enacted an ordinance that made it a misdemeanor to allow anyone under twenty-one years of age in an establishment that had an

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[1] Miss. Code Ann. § 67-3-53(c) provides:

. . . [I]t shall be unlawful for the holder of a permit authorizing the sale of beer or light wine at retail:

> (e) To permit persons of ill repute, known criminals, prostitutes or minor to frequent his licensed premises, ***except minors accompanied by parents or guardians, or under proper supervision.***

(emphasis added).

on-premises retail beer permit, regardless of accompaniment by parents, guardians, or other proper supervision. Collins asserts that conduct lawful under state law was made unlawful by the City ordinance.

¶15. Collins correctly notes that this Court has held that a municipality "could not adopt any valid ordinance, the effect of which would be nullification of the Sate's statutes dealing with the same misdemeanor, such as the possession of beer made legal for personal consumption." ***City of Amory v. Yielding,*** 34 So. 2d 726, 728 (Miss. 1948). "It is well established that in any conflict between an ordinance and a statute, the latter must prevail." ***Watkins v. Navarrette,*** 227 So. 2d 853, 855 (Miss. 1969).

¶16. Collins claims that the state statute allowed on-premises retail beer permit holders to allow persons under twenty-one years of age to enter her club only if accompanied by parents, guardians, or under proper supervision. Miss. Code Ann. § 67-3-53(e). Collins argues that the City ordinance conflicted with this statute and is therefore void. The ordinance makes it a misdemeanor for any permit holder to allow persons under twenty-one years of age to enter on-premises retailers even if such persons are accompanied by parents, guardians, or under proper supervision.[2] Because this is in conflict with Miss.

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[2] The text of the challenged ordinance was not submitted in evidence in this case. However, the parties stipulated in Municipal Court and argued in Circuit Court that the ordinance makes it a misdemeanor offense for a permit holder to allow persons under twenty-one years of age on the premises where beer is sold or consumed.

Code Ann. § 67-3-53(e), Collins asserts the ordinance is void.

¶17. The City responds by stating the ordinance was permissible under Miss. Code Ann. § 67-3-65, under the theory that the ordinance would promote public health, morals, and safety of persons under twenty-one years of age. This Court has spoken before about the special relationship of minors and alcohol. The court stated:

> Society has a greater interest in protecting the welfare of minors than other groups listed in § 67-3-53(b), § 67-1-81 and § 67-1-83. Minors comprise a larger segment of society than do the others listed. The future of society is dependent upon the welfare and protection of its youth. Minority is easily determined by the dispenser of intoxicants, e.g. an I.D. can be required.

Cuevas v. Royal D'Iberville Hotel, 498 So. 2d 346, 348 (Miss. 1986).

¶18. The City adopted an ordinance for the welfare and protection of its youth. The City states that open consumption of beer in the presence of those under twenty-one years of age on a licensed premises is not promoting the public health, morals and safety of those individuals. In further support of their position the City states the youth today are confronted with drugs, crime, violence and innumerable unsavory influences. Therefore, the City adopted the ordinance as authorized by Miss. Code Ann. § 67-3-65 to remove the influence of open consumption of beer in the presence of minors on licensed premises.

¶19. This Court finds the City correctly adopted its ordinance under the authority of Miss. Code Ann. § 67-3-65.

"The police power confers upon the states and local governmental units broad regulatory authority over public health, welfare, and morals." ***Davidson v. City of Clinton, Mississippi,*** 826 F.2d 1430, 1433 (5th Cir. 1987).

¶20. The most recent case in which the Court dealt with municipal ordinances was ***Maynard v. City of Tupelo, Mississippi,*** 691 So. 2d 385 (Miss. 1997). Where the legislature had not clearly expressed an intent, the Court stated, "the public policy considerations in favor of granting a municipality the right to prevent accidents and deaths related to drunken driving, alcohol related altercations, and similar societal ills are so strongly in favor of Tupelo that this Court will allow the ordinance to stand." ***Id.*** at 388. The Court concluded that the Legislature had not preempted the entire area of alcohol regulation with its extensive regulation by the statutes. ***Id.*** The Court found that the Legislature understood the importance of granting local governments the power to regulate the impact of alcoholic beverages within their communities. ***Id.***

¶21. As mentioned earlier in ***Cuevas,*** this Court gives special consideration to minors. There the Court stated "[t]he future of society is dependent upon the welfare and protection of its youth." ***Cuevas,*** 498 So. 2d at 348. The ordinance that this Court upheld in ***Maynard*** has as its objective the promotion of the public safety and welfare of Tupelo. ***Maynard,*** 691 So. 2d at 388. Likewise, the City in the case sub judice enacted the ordinance in order to promote the welfare, morals, and safety of its citizenry under the age of twenty-one. It goes without saying that such an ordinance is needed to prevent persons under the age of twenty-one from entering such premises as Club

O'Hara, where patrons are scanned for weapons prior to entering.

¶22. Because this Court has distinguished its treatment of minors, we hold that the ordinance adopted by the City was valid under Miss. Code Ann. § 67-3-65. Therefore, the decision of the lower court is affirmed.

II. WHETHER THE CONVICTION OF COLLINS WAS AGAINST THE OVERWHELMING WEIGHT AND SUFFICIENCY OF THE EVIDENCE.

¶23. When reviewing the sufficiency of the evidence, this Court must view the evidence in the light most consistent with the verdict and give the States all favorable inferences which may be drawn from the evidence. ***Corley v. State,*** 584 So. 2d 769, 773 (Miss. 1991).

¶24. Collins was charged by the City with wilfully and unlawfully allowing Lakeith Brown, a person under the age of twenty-one years, in Club O'Hara on October 22, 1994. Collins states the evidence proved she was not present when Lakeith entered the Club. She testified that she did not have any intent to allow someone in the Club under the age of twenty-one that night. Collins asserts that a security guard allowed Lakeith to enter the Club, not her.

¶25. Collins argues that the city is holding her guilty for the conduct of her hired security guards when they failed to check Lakeith for proper ID on October 22, 1994. Collins recognizes in Mississippi "[i]n misdemeanors, all who aid, incite, participate or abet the commission of such crime as well as those who perpetrate same are

guilty as principles." ***State v. LaBella,*** 232 So. 2d 354, 355 (Miss. 1970). Collins even states that under ***LaBella,*** "[i]t is not necessary that [a person] be present at the commission of the crime." ***Id.***

¶26. Lastly, Collins argues that she should not be found criminally liable for negligently training her security guards. She states that she could not be found guilty of negligent training or supervision of her employees when the ordinance under which she was charged required her to possess a criminal intent. Collins asserts that in order to sustain the conviction, the City had to prove that she possessed either actual intent or constructive intent. ***City of Jackson v. Gordon,*** 80 So. 785, 785 (Miss. 1919).

¶27. "Under the common law, proof of criminal intent is a necessary element in the prosecution of every criminal case, (except those offenses which are merely malum prohibitum)." ***Lee v. State,*** 146 So. 2d 736, 738 (Miss. 1962). This Court has stated that intent to commit a crime is not required, but rather the mere intent to commit the act is sufficient where certain acts have been enumerated unlawful by statute:

> Although it may be said that intent is a necessary element of all crimes, this does not necessarily connote conscious wrongdoing. There are statutory crimes in which the law categorically forbids certain acts without regard to the state of mind of the actor. In that instance the intent to do the act is only element necessary to complete the offense. The Legislature may define a crime which depends on no mental element and consists only of forbidden acts or omissions.

Boone v. State, 291 So. 2d 182, 186 (Miss. 1974) (internal citations omitted).

¶28. This Court has said that the "intent to do the forbidden act is the only intent necessary to complete the offense." *Roberson v. State,* 501 So. 2d 398, 401 (Miss. 1987). This Court allows statutes to classify conduct as unlawful, and the same can be said for ordinances. In the case sub judice the ordinance made it unlawful to allow any person under the age of twenty-one years inside a premises licensed to sell beer where beer is permitted to be consumed. Lakeith was allowed to enter into the premises by one of the security guards at the Club.

¶29. As Collins concedes, all who aid, incite, participate or abet in the commission of a misdemeanor are guilty as principles. *LaBella,* 232 So. 2d at 355. Collins was charged by the City as a principle in the offense in question because she was the permit holder of an establishment that sold beer at retail and allowed persons under twenty-one years of age to be present where beer was consumed.

¶30. Collins culpability is established by the following excerpts from her cross-examination testimony at trial.

> Q. Now who holds the retail permit to sell beer for the Club O'Hara?
>
> A. Myself.
>
> Q. And who is responsible for making sure that the Club O'Hara is run properly?
>
> A. Myself.

Q. And who is responsible for hiring the people that check the I.D.s and provide the security?

A. Myself.

Q. And who is – was responsible for telling those people that if you have a question about this person, check his I.D.?

A. Myself.

¶31. Collins further stated on cross-examination that every patron did not have to be checked for proper identification.

Q. And the fact that he got by was because of your instructions and your instructions as the owner of the permit, the owner of the Club, the instructions you gave your personnel, if you don't think he looks twenty-one – I mean, if you think he looks twenty-one or older, it's okay.

A. Not saying it so bluntly. I'm saying every single person that comes through the door, if you know that they are twenty-one or older, you don't have to, you know, bother to identify them by asking for their I.D. So, I try to take the proper channel for keeping this – this under – this under twenty-one age limit at a minimum. Had I known that my security guard would have taken the wrong judgment that night, I don't know if I could have avoided it, but if it wasn't him, it could have been someone else. It could have been just for say you or me – me or someone else thinking well she don't look, ah, twenty-one and ask her for an I.D., but on the other hand, I don't think I need to

> ask her for an I.D. because she looks twenty-one. But you can't – you can't go on a guess always. ***But, you know, you don't want to – if you – and, you know, more or less say got a lobby full of people and you're trying to be impartial to everybody, you don't just want to single out every single person. I mean, he can. He did what he was told to do.*** But, you know, next time he – he just judges for himself.

(emphasis added).

¶32. In ***Cuevas,*** this Court stated that "[m]inority was easily determined by the dispenser of intoxicants." ***Cuevas,*** 498 So. 2d at 348. The ordinance stated that no one under twenty-one years of age was permitted in an establishment that had an on-premises retail beer permit, where beer was consumed. Had Collins required all of her patrons to be checked for proper identification prior to their entering her Club, she could have prevented this violation of the ordinance. It is inconceivable to this Court why Collins would have required all of her patrons to be scanned for weapons, but not checked for proper identification.

¶33. It is clear from the record before this Court that the acts of Collins allowed Lakeith Brown to enter Club O'Hara on October 22, 1994. This Court has stated it will not order a new trial unless the verdict is so contrary to the overwhelming weight of the evidence that to allow the verdict to stand would sanction an unconscionable injustice. ***Corley,*** 584 So. 2d at 773. Given the evidence in the record presented to the lower court and on appeal before this Court, we hold that the verdict was legitimate.

Therefore, the lower court verdict should stand and is affirmed by this Court.

CONCLUSION

¶34. The ordinance adopted by the City prohibiting persons under twenty-one years of age to enter establishments with on-premises beer permits, where beer was consumed, was permissible under Miss. Code Ann. § 67-3-65. This ordinance was not in conflict with Miss. Code Ann. § 67-3-53(e), because it promoted the public health, morals and safety of citizens under the age of twenty-one. This Court has previously recognized the importance of protecting its youth from the ills of society. Therefore, the ordinance adopted by the City was valid and enforceable.

¶35. By her own testimony at trial, Collins proved she had the required intent to violate the City ordinance by telling her employees to check only those patrons who they thought were under twenty-one. This Court has previously stated that minority is easily determined by checking each patron for proper identification as a requisite to entering the premises. The guards checked each patron for weapons. How difficult would it have been to have checked the patrons' identification? The verdict was supported by the evidence before this Court on appeal. Thus, the lower court is affirmed.

¶36. CONVICTION OF ALLOWING MINORS IN CLUB O'HARA AND SENTENCE OF THIRTY (30) DAYS IN THE COUNTY JAIL, SUSPENDED ON TWO YEARS GOOD BEHAVIOR PROBATION, AND PAYMENT OF A FINE AND COURT COSTS AFFIRMED.

LEE, C.J., SULLIVAN, P.J., PITTMAN, SMITH AND MILLS, JJ., CONCUR BANKS, J., DISSENTS WITH SEPARATE WRITTEN OPINION JOINED BY PRATHER, P.J., AND McRAE, J.

BANKS, JUSTICE, DISSENTING:

¶37. As salutary as the Hazlehurst ordinance may seem, it nevertheless contravenes state law concerning the sale of alcoholic beverages. Under the guides of protecting minors the majority sanctions an ordinance which in fact governs the conduct of their parents. I am compelled therefore to dissent.

¶38. Our legislature made a considered choice in allowing the purveyors of alcohol to do so in the presence of minors where the minors are "accompanied by parents, guardians, or proper supervision." Miss. Code Ann. § 67-3-53(e). The Hazlehurst ordinance proscribes the admittance of minors to premises where there is sale of alcoholic beverages regardless of whether such minors are accompanied as specified in the statute. Unlike the ordinance involved in ***Maynard v. Tupelo,*** I view the Hazlehurst ordinance as in clear contravention of the state statute. The statute here involved was obviously designed to permit families to gather in restaurants and the like where the sale of alcoholic beverages is permitted but where such minors that are present are under parental or equivalent adult supervision. The Hazlehurst ordinance admits to no such construction. The effect then, it restricts the choices of families to dine or engage in other activities together to places which do not sell alcohol.

This is an unwarranted intrusion into prerogative of parents and guardians. It is just such intrusion that the legislature sought to prevent.

¶39. That is not to say, however, that the facts of this case dictate acquittal. In my view, a twenty-one year old cousin does not necessarily meet the statutory definition of "proper supervison" such that a minor should be permitted to enter. I would reverse the judgment of the trial court and remand this matter for a new trial wherein the determinative issue would be whether the minor in question was accompanied by "proper supervision" under the statute.

PRATHER, P.J., AND McRAE, J., JOIN THIS OPINION.

SUPREME COURT AND COURT OF APPEALS
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February 12, 1998

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This is to advise you that the Mississippi Supreme Court rendered the following decision on the 12th Day of February, 1998.

Supreme Court Case #95-KA-0271
Trial Court Case #14693

Sharlet Belton Collins
vs.
City of Hazlehurst, Mississippi

Motion for Rehearing Denied. Prather, C.J., Banks and McRae, JJ., Would Grant. Waller, J., Not Participating.

Supreme Court Clerk

tgb

ccs: Edward E. Patten, Jr.
AG notified via list
Copiah Country Circuit Clerk

* NOTICE TO CHANCERY/CIRCUIT/ COUNTY COURT CLERKS *

If an original of any exhibit other than photos was sent to the Supreme Court Clerk and should now be returned to you, please advise this office in writing immediately.

IN THE SUPREME COURT OF THE STATE OF MISSISSIPPI

No. 95-KA-0271

SHARLET BELTON COLLINS — APPELLANT

VS.

CITY OF HAZLEHURST, MISSISSIPPI — APPELLEE

APPEAL FROM THE CONVICTION AND SENTENCE RENDERED IN THE CIRCUIT COURT OF COPIAH COUNTY, MISSISSIPPI

APPELLANT'S PETITION FOR REHEARING

(Filed Dec. 29, 1997)

Submitted by:

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MSB # 5314

Counsel of Record
for Appellant

REASONS FOR GRANTING THE PETITION

Appellant, Sharlet Belton Collins, files her Petition for Rehearing, pursuant to Miss. Sup. Ct. R. 40, on grounds that the Court misapprehended points of fact pertaining to weapon searches at Club O'Hara and the Court overlooked and misapprehended certain points of law pertaining to the validity and constitutionality of the City of Hazlehurst, Mississippi's Ordinance making it a crime to permit minors in an establishment that has an on-premises permit.

ARGUMENT REGARDING MISAPPREHENDED FACTS

The Court noted that "[i]t is worth mentioning that before patrons may enter the Club they are checked with a scanner for weapons." [Opinion, p. 3]. And, the Court held that "guards checked each patron for weapons. How difficult would it have been to have checked the patrons' identification?" [Opinion, p. 14]. Seemingly, the Court apprehended that Club O'Hara is a place where persons of ill repute, known criminals, and prostitutes frequent. It is not. The Club is a "restaurant and lounge" [R. 66][1] where patrons go for food and entertainment. Other "functions . . . like fashion shows or wedding receptions and stuff of that nature" are held at the Club. [R. 70].[2] Mrs. Collins did not hire security guards because of fights or any other violent incidents. She hired them "for the

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[1] The testimony establishing these facts appear in this Petition for Rehearing as Appendix "1" – the Red Tab.

[2] See footnote 1, supra.

safety of [her] customers . . . " [R. 66].[3] She wanted her customers to feel safe when they came to the Club. She wanted them to feel safe enough to bring their children to events at the Club – events such as bands playing, wedding receptions, and fashion shows. In fact, Mrs. Collins "strongly stress[ed] that no one under 21 years of age [be] allowed in [her] club . . . " [R. 67].[4] However, she recognized that there are times when a parent or other supervising adult "may want [a person under 21] to come in there" for a special event. [R. 70].[5] The Band "Bones" playing at the Club was a special event when persons under 21 years of age were allowed in the Club if they were under proper adult supervision. The record shows that Mrs. Collins had a concern for the children of customers. Her hiring security guards was part of that concern – to give them peace of mind while they attended special events at the Club. Under the Court's ruling, a 20 year old could not accompany a parent to a wedding reception at the Club; a 20 year old could not accompany a parent to a fashion show at the Club; nor could a 20 year old accompany a parent to listen to a band playing at the Club. The Court's apprehension that Club O'Hara is a dangerous place which requires armed guards to keep the peace is wrong. Security guards are employed at the Club for appearance purposes only. The safer people feel, the more likely they are to patronize a business. This business principle is just as effective for apartment complexes, department stores, shopping centers, and grocery

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[3] See footnote 1, supra.

[4] See footnote 1, supra.

[5] See footnote 1, supra.

stores as it is for Club O'Hara. Some grocery chains and restaurants that sell beer also have security guards. It is no more wrong for Mrs. Collins to sell beer while security guards check for weapons at her premises than it is for Jitney Premier, Korger, Albertson, Good Eats Restaurant, or Ruby Tuesday Restaurant to sell beer while security guards patrol those premises. The fact that security guards are hired, without any record proof of violent incidents having occurred, should not be reason to apprehend that a place is dangerous or bad.

The Court also misapprehended the fact of the privilege granted holders of on-premises permits. If an on-premises beer permittee also possesses an on-premises liquor permit issued by the Mississippi State Tax Commission, then it would be lawful for the permittee to allow persons under 21 inside his or her premises under state law yet unlawful under the city's ordinance. Ms. Collins possessed an on-premises liquor permit while simultaneously possessing an on-premises beer permit.[6] Regulation 17 of the Local Option Regulations of the Mississippi State Tax Commission allows 18 year olds to

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[6] Mrs. Collins testified that Club O'Hara was a restaurant and lounge. [R. 66]. The City of Hazlehurst's ordinance did not make it a crime to permit persons under 21 to enter an establishment with an on-premises liquor permit. Consequently, the fact that Mrs. Collins held an on-premises liquor permit did not become part of the trial below.

lawfully wait "on tables by taking orders for or delivering orders of alcoholic beverages . . . "[7] The Court misapprehended the fact that the purpose of the Hazlehurst Ordinance was to keep minors away from places where adults were drinking. The ordinance only keeps minors away from places where beer is served. It does not keep minors away from places where "hard" liquor is served or consumed. The misapprehension of this fact creates an oxymoron – the Court condemns Mrs. Collins' under the City's ordinance while the Mississippi State Tax Commission condones the same conduct.

ARGUMENT REGARDING OVERLOOKED AND MISAPPREHENDED LAW

The Court held "that the ordinance adopted by the City was valid under **Miss. Code Ann. § 67-3-65**." [Opinion, p. 9] (emphasis added). And, the Court held that "the City correctly adopted its ordinance under the authority of **Miss. Code Ann. § 67-3-65**." [Opinion, p. 8] (emphasis added). These holdings were based upon the Court's construction of *Maynard v. City of Tupelo, Mississippi*, 69 So. 2d 385 (Miss. 1997), as authorizing the City to adopt an ordinance promoting the public safety and welfare of persons under 21 years of age. [Opinion, pp. 8-9]. However, in upholding the City of Hazlehurst's ordinance, this Court overlooked and misapprehended several important points of law.

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[7] Regulation 17 of the Local Option Regulations of the Mississippi State Tax commission is attached as Appendix "B" – The Yellow Tab.

First, the Court overlooked settled law that only the Legislature is vested with authority to define crimes and prescribe punishment. The ordinance challenged here is not a zoning ordinance. It is a criminal ordinance which defines a crime and prescribes punishment. It is settled that "*defining crimes* and prescribing punishment are *exclusively* legislative functions as a matter of constitutional law." *Winters v. State*, 473 So. 2d 452, 456 (Miss. 1985) (emphasis added). That authority "is *vested exclusively* in the *Legislature*, and it may not delegate that power expressly or by implication nor may an administrative agency enlarge the criminal liability of the statute." *State v. Russell*, 358 So. 2d 409, 411 (Miss. 1978) (emphasis added). Therefore, the City was without authority to pass an "ordinance, the effect of which would be nullification of the State's statutes dealing with the same misdemeanor . . . " *City of Amory v. Yielding*, 203 Miss. 265, 34 So. 2d 726, 728 (1948).[8] The Court overlooked this settled law when it held that the City of Hazlehurst had authority, under **Miss. Code Ann. § 67-3-65**, to enact a criminal ordinance enlarging criminal liability under **Miss. Code Ann. § 67-3-53(e)**.[9]

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[8] Appellant recognizes that a municipality may define a crime and prescribe punishment in an area unregulated by the State. *Maynard v. City of Tupelo*, infra. The problem here, however, is that the City of Hazlehurst defined a crime in an area specifically regulated by the State with the City's definition of the crime conflicting with the Legislature's definition. Appellant maintains that the city's definition must yield. *City of Amory v. Yielding*, supra.

[9] The criminal liability Hazlehurst's ordinance enlarges is that making it a misdemeanor for a permittee to allow anyone under 21 to enter an establishment regardless of whether or not

Second, the Court also overlooked settled law that **Miss. Code Ann. § 67-3-65** has been previously interpreted by the Court as granting authority to municipalities and boards of supervisors to regulate the sale of alcoholic beverages by zoning ordinances and orders. This Court has stated, "in its efforts to construe a statute the courts must seek to ascertain the legislative intent of the statute in question as a whole, taking into consideration each provision of the statute on the entire subject." *McCaffrey's Food Market, Inc. v. Mississippi Milk Commission*, 227 So. 2d 459, 463 (Miss. 1969); *Herbert v. Board of Supervisors of Carroll County*, 241 Miss. 223, 231, 130 So. 2d 250, 253 (1961) (same); *Miller v. Board of Supervisors of Forest County*, 230 Miss. 849, 854, 94 So. 2d 604, 605 (1957) (same); *Russell v. State*, 231 Miss. 176, 181, 94 So. 2d 916, 917 (1957). This Court has expressly held that the Legislature granted counties and municipalities the authority, under **Miss. Code Ann. § 67-3-65**, to regulate the possession and sale of beer and light wines by zones. *Alexander v. Graves*, 178 Miss. 583, 173 So. 417 (1937); *Herbert v. Board of Supervisors of Carroll County*, supra. In other words, **Miss. Code Ann. § 67-3-65**, only authorized the City of Hazlehurst to determine where and when beer and light wines may be sold and where and when the sale of such products may be prohibited. *Alexander v. Graves*, supra. This Court in *Hoyle v. State*, 216 Miss. 330, 62 So. 2d 380, 382 (1953), stated that the Legislature did not intend for counties and municipalities to pass ordinances pertaining to conduct concerning alcoholic beverages that

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the minor is accompanied by his or her parent, guardian, or other proper adult supervision.

conflicted with a statute authorizing the conduct. The Court overlooked this settled law in rendering its decision in this case.

Third, the Court overlooked settled authority that for "every * * * power given a municipality to pass by-laws or ordinances there is an implied restriction that the ordinances shall be reasonable, consistent with the general law, and not destructive of a lawful business." *King v. City of Louisville,* 207 Miss. 612, 42 So. 2d 813, 815 (1949). In the instant case, Mrs. Collins had a lawful business which under state law permitted her to allow minors in her establishment if accompanied by a parent, guardian, or other proper adult supervision. Under state law, she could host special events such as wedding receptions, fashion shows, and bands playing with parents attending accompanied by their children under 21. Hazelhurst's ordinance, in effect, destroys Mrs. Collins' lawful business. The Court overlooked this settled law and salient fact in rendering its decision.

Fourth, the Court misapplied *Maynard v. City of Tupelo, Mississippi,* supra. The Court held in the instant case that the Court in *Maynard* "found that the legislature understood the importance of granting local governments the power to regulate the impact of alcoholic beverages within their communities." [Opinion, p. 8]. However, the *Maynard* Court did not state that the Legislature granted local governments unbridled power to regulate the impact of alcoholic beverages within their communities. The *Maynard* Court specifically held that local governments may regulate the impact of alcoholic beverages within their communities only if that impact is "unregulated by the statutory alcohol provisions." *Maynard v. City*

of Tupelo, Mississippi, supra, at 388. The problem with the Hazelhurst ordinance is that it regulates an impact that is already regulated by the statutory alcohol provisions – specifically – **Miss. Code Ann. § 67-3-53(e)**. *Maynard* is distinguishable from the case at bar. In *Maynard* the City of Tupelo regulated an area that was unregulated by state statute. The Court correctly found this regulation to be valid. Here, however, the City of Hazlehurst is regulating an area that is specifically regulated by state statute. The regulation here is void. Where, as here, a municipal ordinance goes beyond the authority granted by a state statute, that ordinance is void. *Watkins v. Navarrette*, 227 So. 2d 853, 855 (Miss. 1969). The Court misapprehended the application of *Maynard* to the facts of the instant case.

Fifth, the prosecution and, conviction of Appellant under Hazlehurst's Ordinance and the Court's decision affirming that conviction violates the Due Process Clause of the Fourteenth Amendment to the United States Constitution and is an ex post facto law. The Court's upholding of the City of Hazlehurst's Ordinance criminalizes conduct that, prior to the decision, was not criminal. The Court, for the first time, has interpreted **Miss. Code. Ann. § 67-3-65,** as granting municipalities the authority to enact ordinances regulating **such other measures as will promote public health, morals, and safety** including an ordinance in direct conflict with a state statute regarding the lawfulness of persons under 21 entering a place where beer is served. Prior to the instant case, Appellant was not given notice that **Miss. Code Ann. § 67-3-65** granted municipalities the authority to enact an ordinance that abrogated rights granted under a state statute. The United States Supreme Court, in *Bouie v. Columbia*,

378 U. S. 347, 351, 84 S. Ct. 1697, 12 L. Ed. 2d 894, 898 (1964), "struck down a state criminal statute under the Due Process Clause where it was not 'sufficiently explicit to inform those who are subject to it what conduct on their part will render them liable to its penalties." Where a person "of common intelligence" has "to speculate as to the meaning of [a] penal [statute], the statute is unconstitutionally vague." *Id.* As a penal statute, **Miss. Code Ann. § 67-3-65** is unconstitutionally vague. It does not give notice to people of ordinary intelligence that it grants municipalities the authority to criminalize conduct deemed lawful under **Miss. Code Ann. § 67-3-53(e).** The Court further held in *Bouie,* supra, 378 U. S. at 352, 12 L. Ed. 2d at 899, that "judicial enlargement of a criminal Act by interpretation is at war with a fundamental concept of the common law that crimes must be defined with appropriate definiteness." Only the Mississippi Legislature has the authority to define crimes. *Winters v. State,* supra, at 456. This Court's interpretation that **Miss. Code Ann. § 67-3-65** grants municipalities the authority to define crimes inconsistent with **Miss. Code Ann. § 67-3-53(e)** is an enlargement of both statutes and violative of the Fourteenth Amendment to the United States Constitution. This enlargement was unforeseeable by Mrs. Collins. "Indeed, an unforeseeable judicial enlargement of a criminal statute, applied retroactively, operates precisely like an ex post facto law, such as **Art 1 § 10**, of the Constitution forbids." *Bouie,* supra, 378 U. S. at 353, 12 L. Ed. 2d at 899. (emphasis added). The Due process Clause of the Fourteenth Amendment prohibits a State Supreme Court "from achieving the same result [as an ex post facto legislative enactment] by judicial construction." *Bouie,*

supra, 378 U. S. at 353-54, 12 L. Ed. 2d at 900. The Court overlooked this settled constitutional precedent in upholding Appellant's conviction in the instant case.

CONCLUSION

Since the Court misapprehended points of fact pertaining to weapon searches at Club O'Hara and overlooked and misapprehended certain points of law pertaining to the validity and constitutionality of the City of Hazlehurst, Mississippi's Ordinance making it a crime to permit minors in an establishment that has an on-premises permit, this Court should grant Appellant's, Sharlet Belton Collins's, Petition for Rehearing, and reverse the decision below and remand the case to the lower Court for further proceedings.

This the 29th day of December, 1997.

/s/ Carroll Rhodes
CARROLL RHODES
Counsel of Record
for Appellant

STATE TAX COMMISSION

Alcoholic Beverage Control

(LOGO)

LOCAL OPTION REGULATIONS

LOCAL OPTION REGULATIONS

REGULATION NO. 17

(As Amended July 1, 1992)

EMPLOYMENT OF PERSONS UNDER 21 PROHIBITED

No holder of a package retailer's permit shall have in his employ in the sale of alcoholic beverages or in the handling thereof (except to unload in sealed cartons, boxes, or similar shipping packages, which packages shall remain sealed at all times they are being handled) any person under the age of twenty-one (21) years old.

Notwithstanding the foregoing, a person who is at least eighteen (18) years of age but under the age of twenty-one (21) years who waits on tables by taking orders for or delivering orders of alcoholic beverages shall not be deemed to unlawfully possess or furnish alcoholic beverages if in the scope of his employment by the holder of an on-premises retailer's permit. This exception shall not authorize a person under the age of twenty-one (21) to tend bar or act in the capacity as a bartender. This regulation is not intended to prohibit a person under twenty-one (21) from working as an entertainer.

PARTIAL TESTIMONY OF LAKEITH BROWN
(Transcript pages 50-52)

CROSS-EXAMINATION BY MR. RHODES:

Q. Mr. Brown, do you mind if I call you Keith?

A. No, sir, I don't.

Q. Okay. Now Keith (sic), when you went to the club on October 22, 1994, you went there with your cousin, Antonio Jordan, didn't you?

A. Yes.

Q. And he was over 21 years of age on that day on October 22, 1994, wasn't he?

A. Yes.

Q. He was over 21. And he was supervising you that night?

A. Yes.

Q. Now, did Captain Smith ever ask you were you there with anybody over 21?

A. No.

Q. And you said that Ms. Collins was the lady who took up the $10 from you prior to your (sic) entering the club?

A. Uh-huh (affirmative response).

Q. Now that was not Mrs. Sharlet Collins?

A. No, sir.

Q. Did [you] see Mrs. Sharlet Collins that night?

A. No.

Q. You didn't see her at all?

A. No.

Q. And you didn't buy any alcoholic beverage, yourself, that night, did you?

A. No.

Q. You didn't drink any, did you?

A. No.

PARTIAL TESTIMONY OF SHARLET BELTON COLLINS
(Transcript pages 65-66, 69)

DIRECT-EXAMINATION BY MR. RHODES:

Q. State your name, please?

A. Sharlet Belton Collins.

. . .

Q. What is your age?

A. Thirty-one (31).

. . .

Q. Mrs. Collins, do you own or operate a retail establishment in the City of Hazlehurst?

A. Yes, I own Club O'Hara.

. . .

Q. And what type of business is Club O'Hara?

A. A restaurant and lounge.

Q. Were you open for business on October 22, 1994?

A. Yes, sir, I was.

Q. Did you possess an [sic] on-premises retail beer permit?

A. Yes.

. . .

Q. Now back on October 22, 1994, when LaKeith Brown entered your club, were you there at the entrance to take up money or checking I. D.s? Were you present in the vicinity at all?

A. No, Sir, I wasn't.

Q. Do you recall seeing LaKeith Brown on October 22, 1994?

A. No, sir, I didn't.

Q. Did you have any intent to violate the City Ordinance on October 22, 1994?

A. No, sir. At no time did I intend to violate the, ah, the City Ordinance. And, I, you know, being at work with the public a lot – what I mean when I say I work with the public a lot, I see a lot of different faces there, but some person that you may think is under 21 is actually 30 years old. Those you think are 30, they're actually 21. I can, ah, the night of this incident, Public Safety Director, Ellis Stewart, come [sic] in our club and he, ah, what I feel like he didn't mean to, he singled out –

Supreme Court, U.S.
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No. 97-1627

In The

Supreme Court of the United States

October Term, 1997

SHARLET BELTON COLLINS,

Petitioner,

vs.

CITY OF HAZLEHURST, MISSISSIPPI,

Respondent.

On Petition For Writ Of Certiorari To The Supreme Court Of The State Of Mississippi

BRIEF IN OPPOSITION

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QUESTION PRESENTED FOR REVIEW

Respondent disagrees with the question presented for review.

The sole question presented for review is whether the Court should exercise its discretion to grant the Petition, when the Petition has not shown that a state court has decided an important question of federal law in a way that conflicts with relevant decisions of the Court.

PARTIES TO THE PROCEEDINGS

The Petition accurately lists the parties to the proceeding.

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ORDINANCE:

Hazlehurst Ordinance No. 180, § 2, sub-section e 1, 3, 9, 10

CONSTITUTIONAL, STATUTORY AND ORDINANCE PROVISIONS INVOLVED

This case involves the Fourteenth Amendment to the United States Constitution; § 67-3-53(e), Miss. Code Ann. (1972); § 67-3-65 Miss. Code Ann. (1972); and City of Hazlehurst, Mississippi Ordinance No. 180, § 2, sub-section e; and § 21-13-11 Miss. Code Ann. (1972).

Fourteenth Amendment to the United States Constitution

Section 1. Citizens of the United States.

All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law, nor deny to any person within its jurisdiction the equal protection of the laws.

§ 67-3-53(e), Miss. Code Ann. (1972)[1]

In addition to any act declared to be unlawful by this chapter, or by Sections 27-71-301 through 27-71-347 and Sections 67-3-17, 67-3-27, 67-3-29, and 67-3-57, it shall be unlawful for the holder of a permit authorizing the sale of beer or light wine at retail:

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[1] This statute was amended in 1995 by Laws, 1995, ch. 398, § 1, which became effective on March 15, 1995. However, the section of the statute involved in this case was not amended.

. . . .

(e) To permit persons of ill repute, known criminals, prostitutes or minors to frequent his licensed premises, except minors accompanied by parents or guardians, or under proper supervision.

§ 67-3-65 Miss. Code Ann. (1972)

Municipalities may enforce such proper rules and regulations for fixing zones and territories, prescribing hours of opening and of closing, and for such other measures as will promote public health, morals, and safety, as they may by ordinance provide. The board of supervisors of any county may make such rules and regulations as to territory outside of municipalities as are herein provided for municipalities. Nothing in this chapter shall prohibit the governing body of any municipality from designating what territory surrounding churches and schools in said municipalities, and the board of supervisors of any county from designating what territory surrounding churches and schools outside of any municipality, in which light wines and beer shall not be sold or consumed.

HAZLEHURST ORDINANCE NO. 180,[2] SECTION 2, SUB-SECTION E

It shall be unlawful for any holder of an on-premises permit to sell beer to permit anyone under the age of 21 years in his or her premises.

SECTION 21-13-11, MISS. CODE ANN. (1972)

Every ordinance passed by the governing body of a municipality, except as is otherwise provided by law, shall be certified by a municipal clerk, signed by the mayor or a majority of all the members of the governing body, recorded in the ordinance book, and published at least one (1) time in some newspaper published in such municipality, or, if there be no such newspaper, then in a newspaper within the county having general circulation

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[2] The ordinance is incorrectly quoted by Petitioner. Ordinance No. 180 is an amendment to prior ordinances and the prior ordinances, specifically Ordinance No. 155, provides the penalty provision as follows:

> Any violation of this order shall be a misdemeanor and any person upon the first conviction thereof shall be punished by fine of $250.00 or imprisoned for not more than thirty days or both. Any person upon a second and/or subsequent offense shall be punished by a fine of not more than $500.00 or imprisoned for not more than thirty days or both, and, in addition, their license shall be automatically suspended for a period of thirty days. In addition, the Mayor and Board of Aldermen may, in their discretion, suspend or revoke the license of any person convicted of violating the terms of this ordinance for additional periods of time if deemed appropriate in the premises.

in said municipality, or, if there be no newspaper published in or having general circulation in same, then in any newspaper published in the State of Mississippi having general circulation in said county; and all of same shall be done before such ordinance shall be effective. The publication of the ordinance may be made as provided in Section 21-17-19. No ordinance shall be in force for one (1) month after its passage; however, any ordinance for the immediate and temporary preservation of the public peace, health or safety or for other good cause, which is adopted by unanimous vote of all members of the governing body, may be made effective from and after its passage by a unanimous vote of all members of the governing body. However, in such cases, such ordinance shall contain a statement of reason why it is necessary that same become immediately effective. All such ordinances shall be published and recorded in the ordinance book in the same manner as other ordinances, but shall become effective immediately upon the adoption thereof, and prior to being so recorded and published. Nothing in this section shall apply to ordinances appropriating money for the payment of the current expenses of the municipality or the payment of sums due on any contract previously made.

STATEMENT OF THE CASE

Sharlet Collins, Petitioner, is the holder of an on-premises retail beer permit which allows the sale of beer by the can to people 21 years of age or older. She owns a restaurant and lounge in the City of Hazlehurst named Club O'Hara. Before the patrons may enter the club, they

are checked with a scanner for weapons. The City of Hazlehurst has an ordinance which prohibits individuals under 21 years of age from being inside a premises licensed to sell beer where beer is allowed to be consumed. Collins, as holder of the permit, was responsible for making sure the club was run properly, responsible for hiring the people that check I.D.'s and provide security, and for telling her employees to check a person's I.D. if there was any question about the person. [Pet. App. 3].

On October 22, 1994, a band named "Bones" was playing at the club. LaKeith Brown, who was 18 years of age at the time, entered the club at approximately 8:30 p.m. with his cousin, Antonio Jordan, who was over 21. There was a security guard checking for weapons with a scanner. He was supposed to check for the safety of customers and identification. The security guard used the scanner to check LaKeith for weapons but did not check his I.D. LaKeith paid $10.00 for entry into the club and was not questioned concerning his age. [Pet. App. 3, 4].

The security guards were instructed to check patrons' identification, unless they knew the person entering the club was over 21. The club had over 100 patrons on this particular night. Collins testified that there were signs on the walls of the lobby to inform patrons that they must be 21 years of age to enter the club and that they must show proper identification upon entering. LaKeith stated that he was not paying attention to any signs when he entered the club. [Pet. App. 4].

LaKeith entered the club and proceeded to the dance floor. He stayed on the dance floor for about 30 minutes and went to the only bathroom in the building. Although

LaKeith stated that the only place he saw people consuming beer was the bar, he had to pass through the bar area of the club to get to the bathroom. As he left the bathroom, LaKeith was pulled to the side by Charles Smith, a police officer for the City of Hazlehurst, and asked to produce his I.D. It was at this time the officer learned LaKeith was 18 years of age. [Pet. App. 4].

Officer Smith then charged Collins with violating the ordinance which makes it a misdemeanor to allow anyone under the age of 21 into a business which has an on-premises retail beer permit regardless of whether the minor is accompanied by a parent or guardian or is under proper supervision. [Pet. App. 4, 5].

Collins, the Petitioner, was found guilty by a jury and the Circuit Court of Copiah County, Mississippi, sentenced Collins to serve 30 days in the county jail, suspended on two years good behavior probation and to pay a fine in the sum of $250.00 and court costs in the amount of $81.00. [Pet. App. 2].

Collins appealed her conviction, asserting two issues to the Mississippi Supreme Court:

I. **Whether the City's ordinance conflicts with a state statute, thereby making the ordinance void.**

II. **Whether the conviction of Collins was against the overwhelming weight and sufficiency of the evidence. [Pet. App. 3].**

The Mississippi Supreme Court affirmed the Trial Court's decision. [Pet. App. 1-17]. The Petitioner filed a Petition for Rehearing on December 29, 1997 and raised

for the first time the issue of violation of the Due Process Clause of the Fourteenth Amendment to the United States Constitution and an *ex post facto* violation which was denied by the Mississippi Supreme Court. [Pet. App. 18].

REASONS FOR DENYING THE PETITION FOR CERTIORARI

THE PETITIONER'S PROSECUTION AND CONVICTION UNDER THE CITY OF HAZLEHURST, MISSISSIPPI'S MUNICIPAL ORDINANCE AND THE MISSISSIPPI SUPREME COURT'S DECISION AFFIRMING THAT CONVICTION DOES NOT VIOLATE THE DUE PROCESS CLAUSE OF THE FOURTEENTH AMENDMENT TO THE UNITED STATES CONSTITUTION.

Petitioner states that prior to the instant case, she had no notice that Miss. Code Ann. § 67-3-65 granted municipal authorities the power to enact an ordinance which abrogated rights under Miss. Code Ann. § 67-3-53(e). This simply is not the case. The statute in question, Miss. Code Ann. § 67-3-53(e) provides, "In addition to any act declared to be unlawful by this chapter . . . " which clearly confers notice to a "person of ordinary intelligence" to look further and determine what, if any, other acts may be unlawful. The statute, Miss. Code Ann. § 67-3-65, which is included in the chapter referred to by Miss. Code Ann. § 67-3-53(e), clearly provides:

> Municipalities may enforce such proper rules and regulations for fixing zones and territories, prescribing of hours and of closing, and for such other measures as will promote the public

> health, morals and safety as they may by ordinance provide . . .

The Mississippi Supreme Court ruled, "this Court finds the City correctly adopted its ordinance under the authority of Miss. Code Ann. § 67-3-65." [Pet. App. 8]. The correct and lawful adoption of a municipal ordinance requires compliance with Miss. Code Ann. § 21-13-11 which provides in part:

> Every ordinance passed by the governing body of a municipality, except as otherwise provided by law, shall be certified by a municipal clerk, signed by the mayor or a majority of all the members of the governing body, recorded in the Ordinance Book, and **published at least one (1) time in some newspaper published in such municipality** . . .
>
> (emphasis added)

It must be presumed by the finding of the Mississippi Supreme Court that the ordinance was duly adopted and that the statutory requirements were complied with *in toto*.

In the instant case, the Petitioner, Collins, had actual knowledge that it was unlawful for individuals under 21 years of age to be in her establishment or club. [App. 2].

The argument of the Petitioner that there has been a denial of due process fails for the following reasons:

(1) Miss. Code Ann. § 67-3-53(e) gives fair warning of other acts declared to be unlawful within the Code chapter;

(2) Miss. Code Ann. § 67-3-65 clearly authorized the adoption of ordinances by the municipality and thereby

gives "fair notice" to "persons of ordinary intelligence" to inquire of the municipality as to which regulations concerning the sale of beer may be applicable;

(3) Hazlehurst Ordinance No. 180 was found to be correctly adopted by the Mississippi Supreme Court which implies notification to the public by publication; and

(4) The Petitioner had actual knowledge that it was unlawful for individuals under the age of 21 years to be on the premises and this was foreseeable.

This Court has stated, "The basic principle that a criminal statute must give fair warning of the conduct that makes it a crime has often been recognized by this Court." *Bouie v. City of Columbia*, 378 U.S. 347, 350 (1964). Petitioner, Collins, explained to the Court in her Petition,

> This Court, in *Bouie v. Columbia*, 378 U.S. 347, 351 (1964), "struck down a state criminal statute under the Due Process Clause where it is not sufficiently explicit to inform those who are subject to it what conduct on their part will render them liable to its penalties" where a person of "common intelligence" has "to speculate as to the meaning of [a] penal [statute], the statute is unconstitutionally vague." Id.

There can be no question that the statutes and ordinance before the Court sufficiently inform the public, including the Petitioner, as to what conduct is objectionable and would not be subject to speculation on the part of a person "of common intelligence". Therefore, the due process argument of Petitioner is without merit. The grievance of Petitioner is nothing more than a factual dispute

that does not rise to the level of an important question of federal law warranting Certiorari.

THE PETITIONER'S PROSECUTION AND CONVICTION UNDER THE CITY OF HAZLEHURST, MISSISSIPPI'S MUNICIPAL ORDINANCE AND MISSISSIPPI SUPREME COURT'S DECISION AFFIRMING THAT CONVICTION DOES NOT CONSTITUTE AN EX POST FACTO LAW.

The adoption and enforcement of Hazlehurst Ordinance No. 180 does not constitute an *ex post facto* law. Petitioner makes no claim that the ordinance was adopted after the offense for which she was convicted occurred.

The issues framed by Petitioner failed to state any of the four basic types of retrospective change which are prohibited by the *ex post facto* clause, including:

(1) Imposing punishment for an act which was innocent when done;

(2) Aggravating the degree of a crime resulting from an act;

(3) Imposing additional punishment beyond those which were prescribed for an act when the act was committed;

(4) Altering the legal rules of evidence so as to allow conviction upon less or different proof then the law required at the time an offense was committed. *Calder v. Bull* (1798), 3 U.S. 386, 3 Dall 386, 1 L.Ed. 648, 131 L.Ed. 2d 1043 § 2 [(a)].

Further, it must be noted that Miss. Code Ann. 67-3-65 clearly grants municipalities the right to adopt rules and regulations and other measures to promote the health, morals and safety of the community by ordinance and this is not an unforeseeable judicial enlargement of a criminal statute applied retroactively that would be violative of the U.S. Const. art. I, § 10.

There is no *ex post facto* violation which this Court should consider.

CONCLUSION

The Petition for Certiorari should be denied.

Respectfully submitted,

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PARTIAL TESTIMONY OF SHARLET COLLINS
(Transcript pages 69-71)

CROSS EXAMINATION BY MR. PATTEN:

Q. You don't agree that people under 21 years of age should not be permitted in your club, do you?

A. Should not be?

Q. That's right.

A. Yes, I agree.

Q. You agree with that?

A. That they shouldn't be in there?

Q. They shouldn't be in there.

A. Without proper supervision, I disagree with it, but if they are under proper supervision.

Q. So, what you say is that if they are supervised, and I take that to mean by someone 21 years of age or older, it's okay for them to be in the club?

A. On different functions such as like fashion shows or wedding receptions and stuff of that nature. It's hard to single out. You know, a parent may want them to come in there for that.

Q. Okay. What about on the night that, I believe it was Bones; is that their name –

A. Yes.

Q. – playing on October 22nd?

A. Yes.

Q. Was it alright for someone under 21 years of age to be there under supervision of a parent or a guardian or a 21-year-old cousin by the name of Antonio Jordan?

A. No.

Q. It wasn't alright. So if he got in there, that was wrong, correct?

A. (Pauses) Yes.

Q. And if he wasn't asked for his I.D. and how old he was, that was wrong?

A. I – well, if he wasn't, it was wrong, but I feel like he was.

Q. You've heard the uncontradicted testimony that he wasn't asked.

A. Uh-huh, I did.

Q. Okay. Nobody has testified otherwise, have they?

A. But if – if the person that was there to ask for I.D.s wasn't in question then he didn't do anything wrong. But if he felt like he wasn't 21 he should have asked.

Q. Okay. If he wasn't asked how old he was and he got into your club, that was wrong, correct?

A. Yes.

Q. Now, who holds the retail permit to sell beer for the Club O'Hara?

A. Myself.

Q. And who is responsible for making sure that the Club O'Hara is run properly?

A. Myself.

Q. And who is responsible for hiring the people that check the I.D.s and provide the security?

A. Myself.

Q. And who is – was responsible for telling those people that if you have a question about this person, check his I.D.?

A. Myself.

. . .